No. 5485

In the

United States

Circuit Court of Appeals

For the Ninth Circuit.

S. S. MILLARD, et al.,

Appellants,

vs.

WILLIAM I. TRAEGER as Sheriff of Los Angeles County, State of California,

Appellee.

BRIEF FOR APPELLANTS.

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I.

STATEMENT OF CASE.

This is an appeal from the final order and judgment of the United States District Court, Southern District of California, Hon. William P. James, judge presiding, discharging a writ of habeas corpus theretofore granted and issued by the court and remanding the appellant Millard to the custody of the appellee, the

sheriff of the County of Los Angeles, State of California, *upon a warrant of rendition* issued by the governor of California on demand and requisition of the governor of Illinois. The date of the judgment is April 25th, 1928 (R. 53). The appeal was taken the same day and after entry of the judgment (R. 55, 56). That the remand is solely upon this warrant of rendition is expressly stated in the record on the appeal (R. 51). The remand therefore was not upon process issuing out of the Municipal Court of Los Angeles County, under the state fugitive law so called, to wit: sections 1548 et seq., Penal Code of California. Any such process of the state court would undoubtedly be superseded by the warrant of rendition. It is true there was process issued by the Municipal Court, but that court discharged it on motion of the accused. The record shows that the writ of habeas corpus was granted by the District Court, on the verified complaint and petition of the appellant Collins, it being alleged in the petition that it is presented to the court in behalf of the prisoner Millard, with his consent and at his request and that the reason he did not make or verify it is that he was unable to do so because of his imprisonment and that

> "the necessary delay in an attempt to have him do so might entail his possible removal beyond the jurisdiction of the court before he could sign and verify the petition" (R. 2).

In other words he would be smuggled out of the jurisdiction and upon the warrant of rendition, a by

no means infrequent occurrence in such cases, and threatened in this one. In any event the District Court considered the showing in the application for the writ of habeas corpus to be sufficient in this particular and granted the writ (R. 6). Nor was any objection made or question raised before the court by the appellee that the showing in the respect stated was inadequate (R. 11, 12, 51). Of course no such objection can be made for the first time on the appeal. (*McCarthy v. Arndstein,* 43 Sup. Ct. 562, 563, 564, and 46 Sup. Ct. 16.) The record states that the case on the writ of habeas corpus issued by the court was heard and determined *on its merits* (R. 51). However and as shown in another part of this brief the appellant Collins had the legal right to make and present the petition and prosecute it to judgment.

II.

RECORD AND QUESTIONS ON WHICH APPEAL PRESENTED.

This appeal is presented upon a duly authenticated record consisting of: (1) the petition for the writ of habeas corpus; (2) the order granting the writ; (3) the writ of habeas corpus; (4) the return to the writ; (5) the answer to the return; (6) the order and judgment discharging the writ and remanding appellant Millard to the custody of the appellee; (7) a bill of exceptions duly allowed, settled, certified, signed and filed; (8) a notice of appeal and assignment of errors; (9) the specification of errors set

forth in this brief; (10) the points, authorities and argument in this brief. The appellant Millard has been released on bail in the sum of ten thousand dollars, pending the appeal.

As shown by the petition for the writ of habeas corpus and the evidence (R. 2, 17, 29, 51), the appellant Millard was held in custody by the appellee as sheriff of the county of Los Angeles under and by authority of a certain interstate rendition warrant issued by the governor of California on the requisition of the governor of Illinois, based upon an *affidavit of complaint* entitled in the Municipal Court of Chicago, and alleging that the appellant Millard

> "did on the 4th day of November, A. D. 1927, at the City of Chicago, County of Cook, in the state aforesaid, feloniously and fraudulently obtain from the U. S. Health Films, Inc., a corporation then and there existing and organized under the laws of the State of Illinois, the sum of twenty-five thousand dollars in lawful money of the United States of America, the personal goods, money, and property of the said corporation by means and by use of the confidence game, with the felonious intent to then and there cheat and defraud the said corporation in violation of Section 98, par. 256, ch. 38 R. S. contrary to the statute in such cases made and provided and against the peace and dignity of the People of the State of Illinois."

This affidavit purports to be made and sworn to before one of the judges of the Municipal Court of Chicago, who however is denied by the statute creating the court, all authority to issue a warrant of arrest

and who therefore is not a magistrate such as required by section 5278 of the Revised Statutes of the United States, (25 *Corpus Juris,* 264). The petition for the writ of habeas corpus presents the following strictly and distinctively Federal questions:

1. That the accusatory affidavit on which the rendition proceedings are based, does not charge the said Millard with treason, felony or other crime as required by section 2 of article IV of the Constitution of the United States and by Section 5278 of the Revised Statutes of the United States.

2. That the accusatory affidavit was not on file in any court at the time of the issuance of the warrant of rendition nor subsequent thereto.

3. That the said Millard did not flee from justice in the State of Illinois nor take refuge in the State of California and is not a fugitive from justice and committed no crime in Illinois.

4. That there is no affidavit *made before a magistrate of Illinois,* charging said Millard with having committed treason, felony or other crime.

5. That the rendition proceedings have been instituted in bad faith and in perversion of the Constitution and laws of the United States and without probable cause and also in fraud and in violation of the jurisdiction of the United States District Court, Northern District of Illinois, Eastern Division in a certain suit in equity there pending, wherein said Millard is plaintiff and the said U. S. Health Films, Inc., is defendant.

6. That the accusatory affidavit and the charge therein made are false, fraudulent and without probable cause.

7. That the imprisonment of said Millard by the appellee is in violation of section 2 of article IV of the Constitution of the United States and of the "due process of law" clause in the Fourteenth Amendment of the Constitution and in violation of section 5278 of the Revised Statutes of the United States.

The *answer to the return to the writ of habeas corpus,* presents all these Federal questions (R. 19), and in addition avers that there is no such crime known to the laws of Illinois as that of "confidence game"; that the accusatory affidavit is based upon section 98, paragraph 230, chapter 38 of the Revised Statutes of Illinois and that said section 98 is in violation of the Fourteenth Amendment of the Constitution of the United States

> "in that in omitting to define the crime it attempts to create and in omitting to specify the essential elements of the crime, it operates to deprive the accused of his liberty without due process of law and denies him the equal protection of the laws";

that the accusatory affidavit is void on its face in not conforming to the requirements of section 2, paragraph 687, chapter 38 of the Revised Statutes of Illinois, in that it contains no statement of the offense charged nor any statement that the affiant has just and reasonable grounds to believe that the accused com-

mitted the offense, as expressly required by the statute; that the *warrant of rendition* issued by the governor of California is void on the face of it and in violation of section 2 of article IV of the Constitution of the United States and in violation of the Fourteenth Amendment of the Constitution and in violation of section 5278 of the Revised Statutes of the United States.

It is shown by the bill of exceptions (R. 29), *inter alia,* (1) that the requisition and demand made by the governor of Illinois and all the papers on which said requisition and demand are based, were introduced in evidence by counsel for the *appellee;* (2) that the requisition and demand in specifying that Millard "stands charged with the crime of confidence game" shows on its face that he is not accused of any crime known to the laws of Illinois; (3) that the requisition and demand by the governor of Illinois do not certify that the *accusatory affidavit is authentic,* as required by section 5278 of the Revised Statutes of the United States; (4) that the papers on which the requisition and demand by the governor of Illinois are based, are not authenticated as required by the laws of the United States, or by the laws of the State of Illinois, or by the laws of the State of California; (5) that the said Millard offered to prove on the hearing of the habeas corpus case before the United States District Court, that he is not a fugitive from justice and in that behalf to show by sufficient evidence that on the 4th day of November 1927, the date stated in the accusatory

affidavit, he obtained by means of a perfectly legitimate business transaction with the U. S. Health Films, Inc., an Illinois corporation, also named in the affidavit, and as a loan by the corporation to him, the sum of twenty-five thousand dollars, for which he executed his two certain promissory notes, not yet matured, one in the sum of fifteen thousand dollars and one in the sum of ten thousand dollars, *fully secured by transfer to the corporation of property exceeding in value the amount loaned;* that it is this perfectly legitimate business transaction that is wrongly, maliciously and wantonly and for purpose solely of private revenge, made the exclusive and only basis of the charge, the altogether false and fraudulent charge on which these interstate rendition proceedings are based and so based in fraud and perversion of the Constitution and laws of the United States; that the very matters connected with the making of the loan and the written contract upon the basis of which the transaction was had between the parties, and the loan itself are involved in a suit in equity brought by Millard as plaintiff against the U. S. Health Films, Inc., in the United State District Court, Northern District of Illinois, Eastern Division, being case No. 8000 in that court and still pending there, awaiting trial in due course; that this suit was brought long prior to the accusation which is made the basis of these interstate rendition proceedings; that according to the decisions of the Supreme Court of Illinois and particularly in the cases of *People v. Santow,* 293 Ill. 430, *People v.*

Kratz, 311 Ill. 118 and *People v. Heinsius,* 319 Ill. 168, 170, the transaction in and by which Millard obtained the loan of twenty-five thousand dollars, was and is a perfectly legitimate business transaction, no confidence game, nor the obtaining of money by the use or means of what is commonly called or known as a confidence game; that on these facts

> "and which we here offer to prove in this habeas corpus case, we will thereby show to this court that Millard is not a fugitive from justice. That we have the legal right to prove the facts stated, for this purpose, we cite to the court the following authorities: *Matter of Strauss,* 197 U. S. 324, 332, 333; *Pettibone v. Nichols,* 203 U. S. 192; *McNichols v. Pease,* 207 U. S. 110; *Ex parte Slauson,* 73 Fed. 666; *Tennessee v. Jackson,* 36 Fed. 258; *In re Cannon,* 47 Mich. 481, 486, 487; *Ex parte Owens,* 245 Pac. 68. Our purpose is not to bring to trial in this habeas corpus case any issue or question of guilt or innocence, but to show that the accusation itself is false and fraudulent, that it is without reasonable or probable cause and is in fraud and perversion of the Constitution and laws of the United States relative to inter-state rendition and that the accused is not a fugitive from justice."

This offer of proof was objected to by counsel for appellee and the objection was sustained by the court, to which ruling exception was duly reserved by appellants, as shown in the bill of exceptions (R. 47, 51), which also affirmatively states that

> "there was no evidence offered, introduced or received, or showing made in the case other than that herein stated. Whereupon the case was argued on its merits and after argument it was

> submitted to the court for its decision, order and judgment, which the court then rendered and entered, on the merits of the case, discharging the writ of habeas corpus and remanding the said S. S. Millard to the custody of the said sheriff, upon said rendition warrant, to which decision, order and judgment the petitioner and the said S. S. Millard then and there duly excepted." (R. 51.)

The Federal questions in the case are presented by the petition for the writ of habeas corpus, by the return to the writ, by the answer to the return, by the order and judgment discharging the writ of habeas corpus and remanding Millard to the custody of the appellee as sheriff of the County of Los Angeles *upon the warrant of rendition,* and by a bill of exceptions (R. 1, 11, 19, 29, 51, 54). No opinion was filed by the District Court.

III.

SPECIFICATION OF ERRORS.

The appellants specify the following errors in the rulings, decision, order and judgment of the United States District Court, Southern District of California, in the case, viz.:

1. The court erred in deciding that the appellant Millard is not imprisoned and restrained of his liberty by the appellee as sheriff of Los Angeles county, in violation of the Constitution and laws of the United States, to wit: section 2 of article IV of the Consti-

tution, also section 1 of the Fourteenth Amendment of the Constitution and section 5278 of the Revised Statutes of the United States.

2. The court erred in deciding, ordering and adjudging that the writ of habeas corpus be discharged and the said Millard remanded to the custody of the appellee as sheriff of the County of Los Angeles, State of California, *upon the governor's warrant of rendition.*

3. The court erred in deciding and ruling that the warrant of rendition is not void on its face in omitting to state necessary jurisdictional facts.

4. The court erred in deciding and in ruling that the requisition and demand of the governor of Illinois upon the governor of California are not void on their face.

5. The court erred in deciding and in ruling that the said Millard is a fugitive from justice of the State of Illinois.

6. The court erred in deciding and in ruling that the accusatory affidavit on which the rendition proceedings are based, was made before a magistrate of the State of Illinois.

7. The court erred in deciding and in ruling that the accusatory affidavit states facts sufficient to constitute in law a crime against the State of Illinois.

8. The court erred in deciding and in ruling that section 98, paragraph 230, chapter 38 of the Revised Statutes of Illinois is not in violation of the Four-

teenth Amendment of the Constitution of the United States, in omitting to define the crime it attempts to create and in omitting to specify the essential elements of the crime and in thereby operating to deprive said Millard of his liberty without due process of law and in denying him the equal protection of the laws.

9. The court erred in deciding and ruling that the accusatory affidavit on which the rendition proceedings are based, is not void by reason of its omission to conform to the requirements of section 50c of paragraph 442 of chapter 37 and section 2 of paragraph 687, chapter 38 of the Revised Statutes of Illinois, in not containing a statement of the offense charged, nor any statement that the affiant has just and reasonable grounds to believe that the accused committed the offense.

10. The court erred in deciding that a "confidence game" in itself and irrespective of whether any money is obtained thereby, is a violation of a statute or law of Illinois.

11. The court erred in deciding and ruling that the requisition and demand of the governor of Illinois, certify that the accusatory affidavit on which the rendition proceedings are based, is authentic, as required by section 5278 of the Revised Statutes of the United States.

12. The court erred in deciding and ruling that the papers on which the requisition and demand by the governor of Illinois are based, are duly and properly authenticated.

13. The court erred in deciding and ruling against the offer to prove that said Millard is not a fugitive from justice of the State of Illinois.

14. The court erred in deciding and ruling against the offer to prove that said rendition proceedings are without reasonable or probable cause and a fraud upon the law and in fraudulent perversion of section 2 of Article IV of the Constitution of the United States and of section 5278 of the Revised Statutes of the United States.

15. The court erred in deciding and ruling against the offer to prove that the accusatory affidavit and the charge therein made are without reasonable or probable cause and a fraud upon the law.

16. The court erred in deciding and ruling against the offer to prove that the accusatory affidavit, the charge therein stated and the said rendition proceedings are maliciously and wantonly made and instituted, in violation and perversion of law.

17. The court erred in deciding and ruling against the offer to prove that no crime was committed by Millard in the State of Illinois.

18. The court erred in deciding and ruling against the offer to prove that the rendition proceedings are in fraud and in violation of the jurisdiction vested by the laws of the United States in the District Court of the United States, Northern District of Illinois, Eastern Division, in the suit there pending, wherein said Millard is plaintiff and the U. S. Health Films,

Inc., is defendant, and presenting for adjudication the very matters involved in said rendition proceedings and in said accusatory affidavit.

19. The court erred in deciding and ruling that the accusatory affidavit was filed in the Municipal Court of Chicago and that the accusation is pending therein.

20. The court erred in deciding and ruling that the Municipal Court of Chicago has jurisdiction of said accusatory affidavit and of the matters therein alleged.

21. The court erred in deciding and ruling that the matters alleged in said accusatory affidavit can be prosecuted thereby and need not be prosecuted by indictment under the laws of Illinois.

22. The court erred in rejecting evidence offered by the appellants that the accused S. S. Millard is not a fugitive from justice in that on November 4th, 1927, the date specified in the accusation, he obtained by means of a perfectly legitimate business transaction with the U. S. Health Films, Inc., an Illinois corporation, also named in said accusation, the sum of twenty-five thousand dollars as a loan, for which he executed his promissory notes, not yet matured, one in the sum of fifteen thousand dollars and the other in the sum of ten thousand dollars, the payment of which notes at maturity is fully secured by transfer to the corporation of property exceeding in value the amount loaned him; that it is this perfectly legitimate business transaction that is wrongfully, maliciously, wantonly and solely for purposes of private revenge made the exclusive and only basis of the charge, the

altogether false charge on which the rendition proceedings are based in fraud and perversion of the Constitution and laws of the United States; that the very matters connected with the making of the loan and the written contract on which the transaction was had between the parties and the loan itself are involved in a suit in equity brought by Millard as plaintiff against the U. S. Health Films, Inc., in the United States District Court for the Northern District of Illinois, Eastern Division, at issue and ready for trial in due course and that this suit was brought long prior to the accusation which is made the basis of these rendition proceedings; that in accordance with the decisions of the Supreme Court of Illinois and particularly in the cases of *People v. Santow,* 293 Ill. 43; *People v. Kratz,* 311 Ill. 110; *People v. Heinsius,* 319 Ill. 168, 170, the transaction in and by which Millard obtained the loan of twenty-five thousand dollars was and is a perfectly legitimate business transaction and not a confidence game and not obtaining money by use or means of a confidence game or by use or means of what is commonly known as a confidence game; that the purpose of this proffered evidence is not to bring to trial in this habeas corpus case any question or issue of Millard's guilt or innocence, but to show that no such question or issue is possible and that the accusation itself is false and fraudulent and without reasonable or probable cause and in fraud and perversion of the Constitution and laws of the United States and that therefore Millard is not a fugitive from justice of the State of Illinois.

The brief and oral argument for the appellee, utterly fail in every particular to answer any one of the many points urged by appellants.

IV.

BRIEF OF ARGUMENT.

THE JURISDICTION.

First as to the *jurisdiction* of both the United States District Court, Southern District of California, and the United States Circuit Court of Appeals for the Ninth Circuit.

It is undoubtedly the well settled law that upon the matters presented in the petition for the writ of habeas corpus, the United States District Court, Southern District of California, had competent jurisdiction to issue the writ and determine the case on its merits.

Judicial Code, sec. 453;
Rev. Stat. U. S., sec. 753;
Ex parte Graham, 216 Fed. 813;
Ex parte Birdseye, 244 Fed. 972;
Day v. Kim, 2 Fed. (2d) 966, 967.

This appeal was taken and perfected pursuant to the provisions of the Act of Congress approved January 31, 1928 (Chap. 14, Public, No. 10, 70th Congress, Sec. 1801), reading as follows:

> "That in all cases where an appeal may be taken as of right, it shall be taken by serving

> upon the adverse party or his attorney of record, and by filing in the office of the clerk with whom the order appealed from is entered, a written notice to the effect that the appellant appeals from the judgment or order or from a specified part thereof. No petition of appeal or allowance of an appeal shall be required; provided however that the review of judgments of state courts of last resort shall be petitioned for and allowed in the same form as now provided by law for writs of error to such courts."

This law had not been amended nor repealed when the appeal was taken and perfected, to wit: April 25th, 1928, the date the judgment and order were made and entered (R. 53, 55, 56). The appeal as a matter of right, to the United States Circuit Court of Appeals from the final order and judgment of the District Court, discharging the writ of habeas corpus and remanding appellant Millard to the custody of the sheriff upon the warrant of rendition, is granted by section 6 of the Act of Congress of February 13, 1925 (43 Stat. 940; Judicial Code, Sec. 463), known as the "Jurisdictional Act of 1925" the provision being as follows:

> "In a proceeding in habeas corpus in a district court or before a district judge, or a circuit judge, the final order shall be subject to review, on appeal, by the Circuit Court of Appeals of the circuit wherein the proceeding is had."

It results that the United States Circuit Court of Appeals for the Ninth Circuit has jurisdiction of the appeal in this case.

V.

THE RIGHT TO PETITION FOR HABEAS CORPUS IN BEHALF OF THE PRISONER.

While not a jurisdictional matter (*Genl. Inv. Co. v. N. Y. C. R. Co.,* 217 U. S. 228, 230, 231), and merely procedural, and not made the basis of any objection in the District Court, by the appellee, there cannot be the slightest doubt whatever but that as a matter of well settled law the appellant Collins had the legal right to make, verify and prosecute the petition for the writ of habeas corpus at the request of Millard and for the reasons in the petition stated (R. 2); and the District Court rightly so held in granting the writ (R. 6, 7).

It is said by a standard authority in stating the law upon the point:

> "The detention or imprisonment may sometimes be of such character that is is inconvenient or impossible for the person detained to make the application, and in any event it may be made by any person on his behalf. But it has been held that a third person may apply only at the request or with the consent of the person in whose behalf he assumes to act, and that a mere stranger has no standing to ask for the writ, though there are also cases holding that such request or consent is not necessary."
>
> 15 *Am. & Eng. Ency. Law,* 192, 193.

A similar statement of the law will be found in:

> 29 *Corpus Juris,* 137, 138, 139;
> *In re Ferrens,* 3 Ben. 442, 445;

United States v. Watchorn, 164 Fed. 152, 153; *Ex parte Dostal,* 243 Fed. 668.

Section 460 of the Judicial Code (R. S. U. S. Sec. 761), clearly recognizes this to be the law by providing that either the *petitioner or the party imprisoned*

> "may deny any of the facts set forth in the return, or may allege any other facts that may be material in the case."

And rule 51 of the District Court provides in reference to applications for habeas corpus that

> "if the application is not made and verified by the party in custody, the person making such application shall verify the same in behalf of such party in custody, and shall set forth in said petition why it is not made and verified by the party in custody, and that he knows the facts set forth therein, or if upon information and belief, the sources of his information shall be stated. (R. S. 754.)"

This rule was strictly complied with in the instant case and the record shows it (R. 2, 6). And the District Court held the fact to be sufficiently shown by granting the writ (R. 6), heard the case on its merits and did not determine it on any objection to the legal sufficiency of the petition, nor remand the prisoner on any such plainly untenable ground or theory. Had the court done so, its decision would be reversed on appeal for this reason alone. But the appellee cannot for the first time raise on the appeal the objection that

the petition must be made by the prisoner and not in his behalf by another.

> *McCarthy v. Arndstein,* 43 Sup. Ct. 562, 563, 564; and 46 Sup. Ct. 16.

And this is undoubtedly the law. The right to petition carries with it the right to prosecute it to judgment. In *Washington, etc., Nav. Co. v. Balt., etc., S. Co.,* 263 U. S. 629, 635, the law is so stated.

VI.

NO FAILURE TO COMPLY WITH RULE 51 OF THE DISTRICT COURT, IN PETITION FILED.

Rule 51 of the District Court provides also that

> "if a previous application for a writ of habeas corpus has been made *in the same matter,* to any other court, that fact shall be set forth in the petition and the action of said court upon said petition shall be set forth therein."

The record shows that a previous petition for habeas corpus *and not in the same matter,* but upon an entirely different imprisonment, had been made by Millard and dismissed *without prejudice,* on his motion in the state superior court (R. 21, 22, 29, 30), the proceeding never having been heard or determined on its merits. And in the bill of exceptions in the record here, the District Court expressly states that at the time of the filing of the petition in the latter court,

> "no application for the writ of habeas corpus had been made in, nor had any such writ issued

out of any state court respecting the custody or imprisonment of said Millard by said sheriff." (R. 29, 30.)

The District Court accordingly ignored the objection of the appellee and heard and determined the case on its merits. In no event would the objection be jurisdictional or anything more than a procedural one and entirely without a semblance of fact to justify or sustain it. Clearly the District Court did right in disregarding it.

VII.

WARRANT OF RENDITION VOID ON ITS FACE, BECAUSE OF OMISSION TO STATE ESSENTIAL JURISDICTIONAL FACTS.

We insistently urged before the District Court, but unsuccessfully, that the warrant of rendition issued by the governor of California, and under which process the appellee as sheriff held the appellant Millard in custody, is void on its face and therefore the custody illegal because of the omission in the warrant of necessary jurisdictional facts (R. 54). Of course it will be conceded on all sides that the warrant of rendition is the sole and only authority and process the law gives the sheriff for the custody of appellant Millard and it is for this reason that the District Court remanded him to the custody of the sheriff, *upon the warrant of rendition* as constituting the necessary process (R. 51). It being the well settled law that there can be no other process or authority for the sheriff's custody of Millard, it results that the

warrant as necessary process and authority to the sheriff cannot be supplemented or corrected or cured in its jurisdictional defects by any other paper or papers in the rendition proceedings, for they are not process and can have no extra-territorial force as process to the sheriff, nor confer upon him the slightest authority to hold the appellant Millard in custody. All of which is self-evident. It results that no recourse can be had to any of the other papers to supply jurisdictional defects on the face of the rendition warrant and such is undoubtedly the well settled law on the point. It is solely by virtue of the governor's warrant of rendition, that the appellee as sheriff has authority to hold Millard in custody and if the warrant be void by reason of jurisdictional defects appearing on the face of it, the custody is illegal because in violation of section 5278 of the Revised Statutes of the United States and the prisoner is therefore entitled to his discharge on habeas corpus.

Now, in the first place, it is the well settled law that a governor's warrant of rendition is void on its face, if it omits to state the essential jurisdictional facts.

Compton v. Alabama, 214 U. S. 1, 6;
Ex parte Hagan, 295 Mo. 435, 443 to 450;
Com. v. Fay, 126 Mass. 237;
State v. Chase, 107 So. Rep. 541, 542, 543;
Ex parte Brannigan, 19 Cal. 136, 137;
Matter of Leddy, 11 Mich. 197;

Howard v. Gosset, 10 Q. B. 353, 452;
2 *Moore on Extradition,* secs. 622 and 625;
Scott on Interstate Rendition, 156, 157.

One of the jurisdictional facts on which the authority to issue a warrant of rendition is made conditional by section 5278 of the Revised Statutes of the United States is that where the proceedings are based upon

> "an affidavit made before a magistrate of any state or territory, charging the person demanded with having committed treason, felony or other crime, certified as authentic by the governor or chief magistrate of the state or territory from whence the person so charged has fled,"

the fact that the affidavit was made *before a magistrate* of the demanding state or territory being essential to the existence of the power of the governor of the state or territory to issue the warrant of rendition, must be stated or recited *in the warrant* or else the process is void on its face, and being void furnishes no authority for the arrest or detention of the accused. The very point that the rendition warrant is void on its face if it omits to state that the accusatory affidavit was made before a magistrate of the demanding state, is distinctly sustained by the authorities last above cited and there is nothing to the contrary in *Glass v. Becker,* 25 F. (2d) 929, for the point was not there raised or decided. No case is authority upon a given point unless the specific point is both raised and decided.

Boyd v. Alabama, 94 U. S. 645, 648;
Dewey v. Des Moines, 173 U. S. 193, 200;

Webster v. Fall, 266 U. S. 507, 511;
United States v. Mitchell, 271 U. S. 9, 14.

It is insufficient that the point was in the record in the case before the court and could have been raised if it was not. Say the Supreme Court:

> "Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents."
>
> *Webster v. Fall,* 266 U. S. 507, 511.

Manifestly it was never the purpose of the court in *Glass v. Becker,* 25 F. (2d) 929, to rule at variance with the conclusive point we urge against the rendition warrant, nor to decide in conflict with the authorities sustaining it, especially as the court makes no reference to any of the authorities on the subject; nor are any of the points we present on this appeal, even remotely suggested in the petition for a rehearing, filed in the case.

We contend on principle and authority that the governor's warrant of rendition under which the appellee as sheriff held the appellant Millard in custody is fatally defective on its face *in omitting to state the jurisdictional fact that the accusatory affidavit was made before a magistrate of Illinois.* Manifestly this point presents no question or objection that the person before whom the affidavit was made, is not a magistrate, but assuming for the purpose of the point the fact that the affidavit was made before a magistrate of Illinois,

we contend that this being confessedly a *jurisdictional fact,* the well settled law requires it to be stated in the rendition warrant, that the accusatory affidavit was made before a magistrate of Illinois, this being expressly required as an essential condition precedent to interstate rendition, by section 5278 of the Revised Statutes of the United States, in cases where there is no indictment, such as the instant one. We do not contend that the accusatory affidavit must be copied into the warrant, but our point is that the warrant must state that the affidavit was made before a magistrate of Illinois, or use some equivalent statement of this jurisdictional fact. Now all that the warrant of rendition states in the instant case upon the point is as follows:

> "And whereas the said representation and demand is accompanied by a copy of complaint, warrant of arrest, certificate of judge and clerk, *affidavit* certified by the governor of the state of Illinois, to be authentic, whereby the said Elid Stanitch, alias S. S. Millard is charged with said crime," etc.,

but there is absolutely nothing in the warrant to show the jurisdictional fact that the complaint or affidavit was made before a magistrate of Illinois. Therefore the warrant is void on its face. The fact that the governor of Illinois is stated in the rendition warrant to have certified that the affidavit is *authentic,* is no statement that it was made before a magistrate, for section 5278 of the Revised Statutes of the United States requires not only that the gov-

ernor of the demanding state certify that the affidavit is authentic, but also that the affidavit be one that has been made before a magistrate. It is therefore stated to be the law that certifying the affidavit to be authentic and so reciting in the rendition warrant, is not a statement nor the equivalent of a statement that the affidavit was made before a magistrate.

Ex parte Hagan, 295 Mo. 435, 443 to 450;
State v. Chase, 107 So. Rep. 541, 542, 543;
2 *Moore on Extradition,* secs. 622 and 625;
Scott on Interstate Rendition, 156, 157.

Manifestly an accusatory affidavit, *not made before a magistrate* can also be correctly and truthfully certified by the governor of the demanding state, to be *authentic,* so that it is clear such a certificate does not necessarily imply nor in the slightest degree import that the affidavit is one that was made before a magistrate. There is no decision to the contrary.

VIII.

NO CRIME SPECIFIED IN WARRANT.

It is also a jurisdictional fact the law requires to be sufficiently stated on the face of the rendition warrant and essential to its validity as process, the crime for which the rendition is granted and it must when *and as thus specified in the warrant,* be a crime under the laws of the demanding state. In the rendition warrant in the instant case the crime specified is

simply that of "confidence game," which in itself is no crime under the laws of the state of Illinois. It is only where money or property or credit is obtained by means of the game that there is a crime. In such cases the "confidence game" *is not the crime*, but only one of the elements necessary under the Illinois statute to constitute the crime. The statute is as follows:

> "Every person who shall obtain or attempt to obtain from any other person or persons, any money, property or credit by means or by use of any false or bogus check or by any other means, instrument or device commonly called the confidence game shall be imprisoned in the penitentiary not less than one year nor more than ten years."
>
> R. S. Ill., sec. 98, par. 230, Ch. 38.

In quoting from the Revised Statutes of Illinois in this brief, we have used Cahill's edition of 1927.

The Federal Court will take judicial notice of the statutes of Illinois. It is so held in:

Hogan v. O'Neil, 255 U. S. 52, 55.

Clearly the warrant of rendition specifies no crime known to the laws of Illinois. To convict a man of "confidence game" would not be a conviction of crime; therefore to state as do both the requisition and the warrant of rendition in the instant case that the appellant Millard is charged with the crime of "confidence game," when there is no such crime, is to render the process void. We again point out that a

"confidence game" is not criminal under the laws of Illinois unless it be what is "commonly called" the confidence game, and unless by means of it, money, property or credit is obtained, in which case the confidence game is but one of the elements of the crime defined by the statute. *The confidence game is not itself the crime.* Had the requisition or demand by the governor of Illinois and the warrant of rendition issued by the governor of California, stated that Millard stands charged with the crime of *obtaining money by means of what is commonly called the confidence game,* it would have been sufficient; but merely to state that he is charged with the crime of "confidence game" and without any statement that he obtained money, property or credit by means of the game, is no designation of a crime known to the laws of Illinois. So far as we have been able to ascertain, no state makes criminal a confidence game merely, but also requires that some one be defrauded of money, property or credit by means of the game.

IX.

WARRANT CANNOT BE AIDED OR SUPPLEMENTED BY OTHER PAPERS.

We have already pointed out in this brief, that if the warrant of rendition is void on its face for any reason, the illegality cannot be remedied by any other paper or papers in the rendition proceedings, nor by

the accusatory affidavit. This is clearly the law on principle and authority.

Ex parte Hagan, 295 Mo. 435, 445;
State v. Chase, 107 So. Rep. 541;
Com. v. Fay, 126 Mass. 237;
Howard v. Gosset, 10 Q. B. 353, 452;
Ex parte Brannigan, 19 Cal. 136, 137;
Matter of Leddy, 11 Mich 197.

Manifestly and as held by the Supreme Court of the United States, the only authority the law sanctions for the arrest and custody of the accused in the state upon which the demand is made, Is THE GOVERNOR'S WARRANT OF RENDITION, (*Compton v. Alabama,* 214 U. S. 1, 6), and therefore if for any reason it be void on its face, the person arrested and detained under it will be discharged on habeas corpus, and this is the well settled law as shown by the authorities we have cited, even though the other papers in the rendition proceedings do not contain or repeat the fatal defects existing in the warrant, but on the contrary *prove the warrant defective.* The record (p. 17) shows in the return made by the appellee as sheriff, to the writ of habeas corpus, that his arrest and custody of the appellant Millard is by virtue of the governor's warrant of rendition. It could not possibly be by any other authority or process in the rendition proceedings. Therefore if the warrant is void on its face the imprisonment is in violation of section 2 of article IV of the Constitution of the United States and of section 5278 of the Revised Statutes of the United States.

The bill of exceptions shows that the District Court remanded Millard to the custody of the appellee *upon the warrant of rendition.* (R. 51). The appellee has also annexed to his return a warrant, the so called fugitive warrant of the Municipal Court of Los Angeles County, but as this warrant has been discharged by the court that issued it, and in any event is superseded by the governor's warrant of rendition, there is no occasion for us to now point out the fatal defects existing in it as process.

X.

RENDITION WARRANT ALSO VOID BECAUSE COPY OF ACCUSATORY AFFIDAVIT NOT CERTIFIED BY GOVERNOR OF ILLINOIS TO BE AUTHENTIC.

Section 5278 of the Revised Statutes of the United States expressly requires that the accusatory affidavit be not only made before a magistrate of the demanding state, but that the governor of the latter *certify the copy to be authentic.* There is no such certificate in the instant case, specifically addressed to the accusatory affidavit, (R. 31), and therefore the warrant of rendition is void because issued in violation of the requirements of section 5278 of the Revised Statutes of the United States. At the hearing on the merits of the habeas corpus case in the District Court, the *appellee* offered and the court received in evidence (R. 30), a certified copy of the papers on which the governor of California issued the warrant of rendition,

but the certificate is by the governor of California (R. 30), and not by the governor of Illinois. One of these papers thus offered and received in evidence is the requisition and demand of the governor of Illinois (R. 31), in which he makes no specific mention of the copy of the *accusatory affidavit* being authentic, but does therein say that the

> "papers required by the statutes of the United States *which are hereunto annexed, and which I certify to be authentic and duly authenticated in accordance with the laws of this state,"* (Illinois);

but it nowhere appears that the copy of the accusatory affidavit was one of the papers annexed. The bill of exceptions expressly states that there *was no* showing or any evidence other than what is stated therein, (R. 51), and certainly there is nothing to indicate that the papers annexed to the requisition of the governor of Illinois, included the accusatory affidavit. In the position the affidavit occupies in the bill of exceptions it is merely one of the papers certified to by the governor of California as being a correct copy of the record *in his office* (R. 30, 34, 35). Then, too, it is manifest that the statement in the requisition of the governor of Illinois that the papers annexed thereto are certified by him "to be authentic and duly authenticated in accordance with the laws of this state," (Illinois) cannot be true, as the authentication to which he refers is fatally defective even under the laws of Illinois, which require the chief justice of the Municipal Court of Chicago to certify that the clerk certifying to the papers on file therein, here one

Jeanne M. Wallace (R. 39, 40), is such clerk and that the attestation is in due form and by the proper officer; but there is no such certificate by the chief justice in respect to *Jeanne M. Wallace.* This certificate is required by paragraphs 55 and 56 of Chapter 51 of the Revised Statutes of Illinois, which are but re-enactments of sections 905 and 906 of the Revised Statutes of the United States and similar to section 1905 of the Code of Civil Procedure of California, reading as follows:

> "A judicial record of a sister state may be proved by the attestation of the clerk and the seal of the court annexed, if there be a clerk and seal, together with a certificate of the chief judge or presiding magistrate that the attestation is in due form."

It is not our contention that the authentication required by the statute is necessary in interstate rendition cases. On the contrary we concede that only the certificate of the governor of the demanding state that the accusatory affidavit is authentic, is required by section 5278 of the Revised Statutes of the United States, but in the instant case the rendition papers include what is designated on its face "Authentication for Extradition," (R. 38, 39, 40), and it is this authentication that is referred to by the governor of Illinois in his requisition on the governor of California, as making the rendition papers authentic in accordance with the laws of Illinois (R. 31). Now as the authentication to which reference is thus made and which by the way is considered very material and im-

portant by the appellate court in its reasoning and decision in *Glass v. Becker,* 25 F. (2d) 929, is in the instant case a void authentication, it results that the Illinois governor's certificate that the *papers* are authentic even did they include the accusatory affidavit, is also void, because based upon a void authentication. We say "a void authentication," as there is no certificate by *James A. Kearns,* the clerk who issued the warrant of arrest (R. 37), that the person before whom it is claimed the accusatory affidavit was made, to wit: Judge Hartigan is a judge of the municipal court of Chicago, nor is there a certificate by the chief justice that the person named clerk of the municipal court of Chicago, as being the clerk who gives the certificate and makes the attestation, to wit: Jeanne M. Wallace (R. 39, 40), is a clerk of the court, nor is there the required certificate from the chief justice of the municipal court of Chicago, to the official character of Jeanne M. Wallace as clerk of the court, nor that the certificate and attestation by Jeanne M. Wallace is in due form of law. True, the chief justice does certify to the official character of *Kearns as clerk* (R. 39, 40), *but there is no certificate or attestation by Kearns,* the attestation and certificate being only by Jeanne M. Wallace (R. 38, 39). It results that the very papers referred to in the requisition as being the basis of the certificate of the governor of Illinois, that *they* are authentic, but not specifying the copy of the accusatory affidavit and not indicating that the affidavit was one of the papers, are shown *not to be authentic* by the very authentication on

which the governor bases his certificate, even did they include the copy of the affidavit. The certificate as given by the governor of Illinois, that the *papers* are authentic is expressly based upon the authentication attached to them and which shows that they are not authentic. Now were the copy of the accusatory affidavit, one of the papers, it follows that the certificate of the governor of Illinois that it is authentic, is shown to be untrue by the manifestly void authentication *upon which it is expressly based.* True it would have been sufficient had the governor of Illinois simply certified that the copy of the affidavit is authentic, and this is all that is required on the point, by section 5278 of the Revised Statutes of the United States, but he has not done so and the papers he furnished the governor of California show affirmatively that were the copy of the affidavit one of them, it is not authentic, the authentication being clearly void on the face of it. It will be noted that section 5278 of the Revised Statutes does not require the governor of Illinois to certify that the *original* accusatory affidavit is authentic, but that the *copy* of it in the rendition papers, is authentic. Therefore, if, as in the instant case, he goes further and states that his certificate is based on the authentication appearing in the papers annexed to his requisition and the authentication is void, his certificate based upon it is also void, did it include the required copy of the affidavit. Of course any certificate that a copy of a paper is authentic, would be a nullity if the authentication on which it is based is void on the face of it as an authentication, even though no formal

authentication be necessary, it being sufficient did the governor of the demanding state simply certify the copy to be authentic and not make his certificate of authenticity dependent upon another authentication that is plainly void, and thereby showing that the copies of the papers covered by it are not authentic. What the governor of Illinois really did in his requisition is to say that the copies of the papers annexed to it are authentic, only so far as shown by the authentication accompanying them. In other words he bases his certificate that they are authentic upon the authentication. Clearly if it is void as an authentication, his certificate being expressly based upon it is also void, for it shows that the copies to which it refers are not authentic.

XI.

JUDGE HARTIGAN NOT A MAGISTRATE UNDER THE LAWS OF ILLINOIS.

The purported copy of the accusatory affidavit is stated to have been made before "Matthew D. Hartigan, Judge of the Municipal Court of Chicago." (R. 35.) Assuming him to be such, the laws of Illinois do not make him a magistrate, but on the contrary expressly deprive the judges of the court of all official authority apart from the court. In other words and owing to the peculiar statutory provisions on the subject, the judges of the Municipal Court of Chicago can only function officially in a criminal case when

sitting as a court. It is virtually so provided by section 50c of paragraph 442, chapter 37 of the Revised Statutes of Illinois, in the following terms, viz:

> "That the practice in all proceedings in the municipal court for the arrest, examination, commitment and bail of persons charged with criminal offenses shall be the same, as near as may be, as is provided by law for similar proceedings before judges of courts of record and justices of the peace, with the following exceptions:
>
> "First: The complaint shall be filed with the clerk of the municipal court, who, when so ordered by the court, shall issue a warrant, which shall be directed to the bailiff and all sheriffs, coroners and constables within this state and shall require the officer to whom it is directed to forthwith take the person of the accused and bring him before the court, and all proceedings in the case shall be proceedings in court instead of proceedings before a judge thereof and all orders entered in such proceedings shall be orders of the court instead of orders of a judge thereof and shall be entered of record as orders in other cases."

Undoubtedly a judge of the municipal court may administer an oath to an affidavit, but so may a notary public, yet this power does not in itself constitute either of them a *magistrate* within the meaning of section 5278 of the Revised Statutes of the United States. The fact that all authority to issue a warrant of arrest is denied a judge of the municipal court, shows he is not a magistrate. The law is so stated in:

25 *Corpus Juris* 264.

A notary public or a clerk may be constituted a magistrate by statute, but this is exceptional and there is no such statute in Illinois. Were it not for the restrictive provisions of the Illinois statute to the contrary, a judge of the Municipal Court of Chicago would *ex officio* be a magistrate, but the statute not only denies him the power to be such, but expressly provides that the complaint or accusatory affidavit and all other proceedings in the case must be "in court instead of proceedings before a judge thereof." It is true that in the instant case the accusatory affidavit is entitled in the Municipal Court of Chicago, but shows on its face that it was not made before the court and was made only before a judge of the court. (This is also stated at pages 35, 36, 37, 38 and 39 of the record). The same judge acting not as a court but as a judge and pursuant to the provisions of section 27 of paragraph 415, chapter 37 of the Revised Statutes of Illinois, has endorsed on the complaint or accusatory affidavit, that he has examined the same and the complainant and is satisfied that there is probable cause *for filing it* (R. 35, 36), not probable cause for the accusation; but this is clearly a void endorsement as the statute in that behalf applies only to criminal cases in the municipal court "in which the punishment is by fine or imprisonment otherwise than in the penitentiary" (R. S. Ill. sec. 27, par. 415, chap. 37), and therefore has no application to the instant case, for here the punishment is by imprisonment in the penitentiary. See statute quoted in subdivision VIII of this brief.

As we shall show further on in this brief, the offense of obtaining money by means of a confidence game can only be prosecuted by *indictment* and is one over which no jurisdiction is conferred on the municipal court, by complaint or information. A correct construction of section 5278 of the Revised Statutes of the United States requires in such a case, a copy of the *indictment* and not a copy of an affidavit. It is only where a criminal charge can be made by means of an affidavit or verified information, under the laws of the demanding state, that the affidavit will suffice. Such cases are provided for in section 27 of paragraph 415, chapter 37 of the Revised Statutes of Illinois, but are there expressly restricted to crimes not punishable by imprisonment in the penitentiary. The point will be presented in another part of this brief and the statute set forth.

XII.

ACCUSATORY AFFIDAVIT IS FATALLY DEFECTIVE AS A CHARGE OF CRIME.

The accusatory affidavit is fatally defective as a charge of crime and for the following reasons:

1. In the first place, as a complaint for preliminary examination of the accused, it is void because it does not comply with the statutory requirement in Illinois that the

> "complaint shall contain a concise statement of the offense charged to have been committed and

> the name of the person accused and that the complainant has just and reasonable grounds to believe that such person committed the offense."

The entire statute is as follows:

> "Upon complaint made to any such judge or justice of the peace that any such criminal offense has been committed, he shall examine on oath the complainant and any witness produced by him, shall reduce the complaint to writing and cause it to be subscribed and sworn to by the complainant; which complaint shall contain a concise statement of the offense charged to have been committed and the name of the person accused, and that the complainant has just and reasonable grounds to believe that such person committed the offense."
>
> R. S. Ill., Chap. 38, par. 687, sec. 2.

Now assuming that a judge of the Municipal Court of Chicago is such a judge as provided for in this statute, the accusatory affidavit in the instant case is in plain violation of the statute in omitting to contain a concise or any statement of the offense charged, or in other words and more specifically a statement of the facts constituting the crime attempted to be charged *and is also in violation of the statute in omitting to state that the complainant has just and reasonable grounds to believe that the accused committed the offense.* This latter requirement is made just as important and essential by the statute as the conjoined requirement that the complaint state the name of the person accused and contain a statement of the offense charged, and especially is it of the first

importance in an interstate rendition case where it is insistently and strenuously contended that the complainant has no just or reasonable ground to believe that the accused committed the offense and there is no probable cause whatever for making the charge against him. Undoubtedly it is competent for the Legislature to specify the elements essential to a valid complaint and the omission to comply with the statutory requirement, renders the complaint absolutely void.

2. In the second place the accusatory affidavit is void as a charge of crime in omitting to state facts sufficient to constitute the crime it attempts to charge.

As held by the Circuit Court of Appeals for the Fourth Circuit in a case never overruled or questioned on the point:

> "The affidavit required in such cases should set forth the facts and circumstances relied on to prove the crime, under the oath or affirmation of some person familiar with them whose knowledge relative thereto justifies the testimony as to their truthfulness."
>
> *Ex parte Hart,* 63 Fed. 259.

Of course an affidavit charging no crime, makes void interstate rendition proceedings based upon it. This also is well settled law.

Ex parte Smith, 3 McLean, 121;
People v. Brady, 56 N. Y. 182, 190, 191;
In re Greenough, 31 Vt. 279;
Ex parte Spears, 88 Cal. 642, 643;
Ex parte Dimmig, 74 Cal. 164, 166;

2 *Moore on Extradition,* sec. 555;
Scott on Interstate Rendition, 150.

Section 5278 of the Revised Statutes of the United States expressly requires an affidavit *charging* the person demanded as a fugitive, with having committed treason, felony or other crime. In the instant case the accusatory affidavit charges no crime, in that the Illinois statute makes necessary that the money be obtained

> "by means or by use of any false or bogus check, or by any other means, instrument or device commonly called the confidence game."

As held by the Supreme Court of the United States, an accusation is void if it omits an essential element of the crime.

United States v. Cruikshank, 92 U. S. 542, 558, 559;
United States v. Hess, 124 U. S. 483, 486;
Keck v. United States, 172 U. S. 434, 437.

To the same effect, see:

1 *Bishop's New Crim. Proc.* (2d ed.) pg. 75 and also see sec. 98a;
31 *Corpus Juris,* 703.

In the instant case there is no allegation or statement in the accusatory affidavit or complaint that the appellant Millard obtained the money "by means or by use of any false or bogus check," *and there are no facts set forth in the charge,* to show that the money was obtained by "any other means, instrument or device commonly called the confidence

game." It is true the accusatory affidavit does allege that the money was obtained

> "by means and by use of the confidence game,"

but this is clearly inadequate as it is manifestly the mere conclusion of the affiant, there being no facts stated on which the conclusion is based, to bring the charge within the terms of the statute. And this is essential. Whether or not the money was obtained by

> "the means, instrument or device commonly called the confidence game,"

as required by the statute, is a conclusion of law depending upon certain facts showing *fraud* perpetrated and the *facts* must be set forth in the accusatory affidavit or complaint, so that the *court* and not the accuser or the affiant, may determine whether the statute has been violated.

> "It is an elementary principle of criminal pleading that where the definition of an offense, whether it be at common law or by statute, includes generic terms, it is not sufficient that the indictment shall charge the offense in the same generic terms as in the definition; but it must state the species,—it must descend to particulars."
>
> *United States v. Cruikshank,* 92 U. S. 542, 558.

Even were the language of the statute used in the accusation, it would not be sufficient.

> *United States v. Carll,* 105 U. S. 611, 612;
> *Evans v. United States,* 153 U. S. 584, 587, 588.

Then, too, the statute does not make the obtaining of the money by "confidence game" sufficient to con-

stitute the crime, but expressly states that it must be *by means, instrument or device commonly called the confidence game.* There is no such allegation or statement in the accusatory affidavit in the instant case. Clearly if the affiant was charged with perjury in falsely stating in the affidavit that the money was obtained by means, instrument and device *commonly called* the confidence game, there could be no conviction on the affidavit, as actually made, for there is no such statement in it. And if the perjury charge were that the false statement consisted in swearing that the money was obtained "by means and by use of the confidence game," it could not be sustained for want of the necessary materiality, as the statute makes it essential that the confidence game required, be what is *commonly called* such. There certainly is no statement in the accusatory affidavit in the instant case, (R. 34, 35), that the money was obtained *by means, instrument and device commonly called the confidence game.* Manifestly these words cannot be eliminated from the statute, but must be given effect. The statute plainly takes a distinction and recognizes a difference between what is *commonly called* a confidence game and a confidence game *that is not commonly called* such. In other words whether the confidence game is one that is *commonly called* such, is a question the statute in express terms makes necessary in the case and therefore it is essential to the charge that it be explicitly averred the money was obtained *by means, instrument and device commonly called the confidence game;* and further we insist that the means, instru-

ment and device must be specified so that the court may determine for itself as a matter of law, that it is what is *commonly called* the confidence game. (*United States v. Cruikshank,* 92 U. S. 558, 559). Instead of this we have in the accusatory affidavit, merely the conclusion and opinion of the affiant, that the means, instrument and device, (not disclosed nor specified), by which the money was obtained, is a confidence game, and not that it is what is *commonly called* the confidence game. Surely, and as repeatedly held by the authorities, it would not for instance, be sufficient to charge that money was obtained by means of false pretenses or representations, but it is necessary to specify the pretenses and representations. (*People v. McKenna,* 81 Cal. 158.) Clearly if the confidence game by which the money was obtained is not what is "commonly called" the confidence game, the case is not within the statute. Of course we are aware that the Illinois statute in providing for the sufficiency of an *indictment,* says that as an indictment

> "it shall be deemed and held a sufficient description of the offense to charge that the accused did, on, etc., unlawfully and feloniously obtain or attempt to obtain (as the case may be) from A B (here insert the name of the person defrauded or attempted to be defrauded), his money (or property, in case it be not money) by means and by use of the confidence game,"

but clearly this does not include an accusatory *affidavit.* The law is so stated in:

> *People v. McLaughlin,* 243 N. Y. 417, 419;
> 2 *Moore on Extradition,* page 1025.

In deciding whether for the purpose of interstate rendition proceedings there is a charge of crime, a distinction and difference exists in law between an accusatory affidavit and an indictment, there being much more stringent requirements exacted respecting the sufficiency of an affidavit to charge a crime, than in the case of an indictment. The latter is the result of a judicial investigation by the grand jury, but an affidavit is merely the *ex parte* statement of the person making it. This distinction between an indictment and an accusatory affidavit in interstate rendition proceedings is pointed out in:

People v. Brady, 56 N. Y. 182, 190, 191;
People v. McLaughlin, 243 N. Y. 417, 419;
Ex parte Hart, 63 Fed. 259;
2 *Moore on Extradition,* page 1025.

The statute in Illinois providing for the form of the *indictment* and its sufficiency, cannot be construed to apply also to an accusatory affidavit or complaint, and especially as there exists another statute in Illinois, heretofore quoted in this brief, providing for the necessary contents of the affidavit or complaint, and expressly requiring that it

> "shall contain *a concise statement of the offense charged to have been committed* and the name of the person accused, and that the complainant has just and reasonable grounds to believe that such person committed the offense."
>
> R. S. Ill., sec. 2, par. 687, chap. 38.

Manifestly this statute requires the accusatory affidavit or complaint to set forth the facts constituting the offense and every element of it, omitting none.

3. In the third place the accusatory affidavit is void as a charge of crime in that the statute on which the charge is based, to wit: section 98, par. 230, chapter 38 of the Revised Statutes of Illinois is unconstitutional, because in violation of the "due process of law" clause in the Fourteenth Amendment of the Constitution of the United States, in entirely omitting to define with requisite certainty the crime attempted to be created or to specify the elements essential to the existence of the crime or to furnish any standard by which a person may know what constitutes a "means or instrument or device commonly called the confidence game," so as to avoid violating the law. And the statute introduces a still greater amount of uncertainty in taking a very arbitrary distinction between what is *known* as the confidence game and what is *commonly called* such a game, the latter being impossible of ascertainment in advance of accusation.

Therefore, it not being possible for any man to ascertain how to conduct himself or his business or affairs so that he will not violate the statute, it operates to deprive him of his liberty without due process of law. Police officers and gamblers and bunco men may know what is *commonly called* the confidence game but the rest of the community is certainly ignorant of it. Any attempted classification of the confidence game into what is such in fact and what is

commonly *called* such, is undoubtedly arbitrary and violates the clause in the Fourteenth Amendment prohibiting the several states from denying to a person the equal protection of the laws.

Missouri R. Co. v. May, 194 U. S. 267;
Barrett v. Indiana, 229 U. S. 26;
Watson v. Maryland, 218 U. S. 79;
Atchison v. Matthews, 174 U. S. 104.

And in any event a statute omitting to define with certainty the crime it attempts to create and to prescribe the boundary line between what is and what is not prohibited, is unconstitutional and void as it operates to deprive a man of his liberty without "due process of law." It is so held in:

Cline v. Frink Dairy Co., 274 U. S. 445, 457, 458, 47 S. C. Rep. 681, 684, 685;
Connally v. General Constr. Co., 269 U. S. 385, 391, 392;
International Harvester Co. v. Kentucky, 234 U. S. 216, 221;
Collins v. Kentucky, 234 U. S. 634, 638;
United States v. Cohen Grocery Co., 255 U. S. 81, 92.

Applying the principle controlling these decisions, the statute in question is clearly unconstitutional and void. The courts of Illinois in construing the statute in question, hold that

> "the gist of the crime is the obtaining of the confidence of the victim by some false representation or device,"

and then by means of the confidence thus *fraudulently* obtained, swindling the victim out of money or property.

People v. Harrington, 310 Ill. 616;
People v. Rosenbaum, 312 Ill. 330, 332.

Clearly then, the charge or accusation is fatally defective if it does not set forth the *facts constituting the fraud* by means of which the property was obtained.

United States v. Cruikshank, 92 U. S. 558, 559;
People v. Mahoney, 145 Cal. 106, 107, 108;
People v. McKenna, 81 Cal. 158.

This is especially true of an accusatory affidavit in an interstate rendition proceeding.

People v. Brady, 56 N. Y., 182, 190, 191.

Were the facts pleaded it may well be that they would show the entire absence of a confidence game and that what the person who made the accusatory affidavit states as his conclusion or opinion to be a "confidence game," was not such, but, on the contrary, constituted a perfectly legitimate business transaction, and not at all within the statute.

People v. Santow, 293 Ill. 430;
People v. Kratz, 311 Ill. 118;
People v. Heinsius, 319 Ill. 168, 170.

There can be no difficulty in alleging in the accusation *the facts showing* the existence of a confidence obtained by means of fraudulent pretense and repre-

sentation, or by fraudulent device, and that by means of this confidence so obtained, the victim was swindled out of money or property. This, according to the decisions of the Supreme Court of Illinois, constitutes the offense of getting the money or property by means of what is commonly called the confidence game.

People v. Harrington, 310 Ill. 616;
People v. Rosenbaum, 312 Ill. 330, 332.

Taking this construction placed on the statute by the Supreme Court of Illinois as being a part of the statute and as removing the otherwise conclusive objections to its validity on constitutional grounds, it results that the accusatory affidavit must conform to this settled construction respecting the meaning of the statute, *and plead the facts constituting the fraud,* or no crime is charged, and therefore the case is not brought by the accusation, within the requirement of section 5278 of the Revised Statutes of the United States, that the accusatory affidavit to be sufficient as the basis for interstate rendition, must charge either "treason, felony or other crime". The accusatory affidavit in the instant case alleges nothing to indicate that any money or property was obtained by means of a confidence fraudulently induced, nor that by means of such confidence so fraudulently induced, the U. S. Health Films, Inc., was swindled out of its money or property. It results that the affidavit charges no crime. The facts constituting the *fraud* denounced by the statute are not pleaded. It was for this reason the accusatory affidavit in *People v. Brady,* 56 N. Y.

182, was held insufficient to sustain the interstate rendition proceedings there involved, and the accused was accordingly discharged on habeas corpus. If, as held in *Maxwell v. People,* 158 Ill. 248, the offense is not susceptible of definition, then so much the worse for the statute, on constitutional grounds; but we are certain that the facts constituting the *fraud* can and should be specially pleaded in the accusation.

XIII.

MUNICIPAL COURT OF CHICAGO HAS NO JURISDICTION OF THE CASE.

1. We have in this brief (subdivision XI), already pointed out that by express provision of the Illinois statute (R. S. Ill., chap. 37, par. 442, sec. 50c), all orders and proceedings in the matter of the accusation, arrest, examination, commitment and bail of persons charged with criminal offenses, are required to be *in court* "instead of proceedings before a judge thereof", and that as the accusatory affidavit or complaint that is made the basis of the inter-state rendition proceedings in the instant case, was made before a judge of the court and not before the court, it is a nullity, as the statute denies all authority and jurisdiction to the judge and vests it exclusively in the court *as a court.*

2. But if it be contended that the complaint is to be considered as an information in the Municipal Court of Chicago, the court would still have no juris-

diction of it, as the crime, if any charged, is one that is punishable in the penitentiary. Section 27 of paragraph 415 of chapter 37 of the Revised Statutes of Illinois is as follows:

> "All criminal cases in the municipal court in which the punishment is by fine and imprisonment otherwise than in the penitentiary, may be prosecuted by information of the Attorney General or State's Attorney or some other person and when an information is presented by any person other than the Attorney General or State's Attorney it shall be verified by affidavit of such person that the same is true or that same is true as he is informed and believes."

By section 8 of article 2 of the constitution of Illinois, all offenses punishable by imprisonment in the penitentiary must be prosecuted by indictment of the grand jury and not by information. More than this the accused Millard cannot be held to answer but upon indictment. The provision is as follows:

> "No person shall be held to answer for a criminal offense unless on indictment of a grand jury, except in cases in which the punishment is by fine or imprisonment otherwise than in the penitentiary, in cases of impeachment, and in cases arising in the army and navy, or in the militia when in actual service in time of war or public danger. Provided the grand jury may be abolished by law in all cases."

The court will take judicial notice that in Illinois the grand jury has not been abolished. Under this constitutional provision an indictment is jurisdictional.

Ex parte Bain, 121 Cal. 1.

It results that the municipal court of Chicago has no jurisdiction of a charge punishable in the penitentiary when prosecuted by complaint or information and not by indictment.

XIV.

REVERSIBLE ERROR IN REJECTING EVIDENCE.

At the hearing of the case the District Court on objection by the appellee rejected the offer of appellants to prove that the accusation and the rendition proceedings based upon it are without probable cause and in perversion, subversion and fraud of the laws relative to interstate rendition. The rejected offer of proof will be found at pages 47, 48 and 49 of the Record and is as follows:

> "We offer to prove if the court please, that the accused, S. S. Millard, is not a fugitive from justice and in that behalf to show by sufficient evidence that on the 4th day of November, 1927, he obtained by means of a perfectly legitimate business transaction with the U. S. Health Films, Inc., an Illinois corporation, and as a loan by the corporation to him, the sum of twenty-five thousand dollars, for which he executed his two certain promissory notes not yet matured, one in the sum of fifteen thousand dollars and one in the sum of ten thousand dollars, fully secured by transfer to the corporation of property exceeding in value the amount loaned him. We propose to show that it is this perfectly legitimate business transaction, that is wrongly, maliciously and wantonly and for purpose solely of private revenge made the exclusive and only basis of the

charge, the altogether false charge on which these extradition or more accurately these inter-state rendition proceedings are based, in fraud and perversion of the Constitution and laws of the United States. We propose further to prove that the very matters connected with the making of the loan and the written contracts out of which the transaction was had between the parties, and the loan itself are involved in a suit in equity brought by Millard as plaintiff against the U. S. Health Films, Inc., in the United States District Court, Northern District of Illinois, Eastern Division, being case No. 8000 in that court and still pending there awaiting trial in due course; and we will prove if permitted, that this suit was brought long prior to the accusation which is made the basis of these inter-state rendition proceedings. We will show that according to the decisions of the Supreme Court of Illinois and particularly in the cases of *People v. Santow,* 293 Ill. 430, *People v. Kratz,* 311 Ill. 118 and *People v. Heinsius,* 319 Ill. 168, 170, that the transaction in and by which Millard obtained the loan of twenty-five thousand dollars, was and is a perfectly legitimate business transaction, no confidence game and does not constitute under the laws of Illinois a confidence game nor the obtaining of money by the use or means of what is commonly known as a confidence game. On the facts stated and which we here offer to prove in this habeas corpus case we will thereby show to this court that Millard is not a fugitive from justice. That we have the legal right to prove the facts stated for this purpose, we cite to the court the following authorities: *Matter of Strauss,* 197 U. S. 324, 332, 333; *Pettibone v. Nichols,* 203 U. S. 192; *McNichols v. Pease,* 207 U. S. 110; *Ex parte Slauson,* 73 Fed. 666; *Tennessee v. Jackson,* 36 Fed. 258; *In re Cannon,* 47 Mich. 481, 486, 487; *Ex parte*

> *Owens,* 245 Pac. 68. Our purpose is not to bring to trial in this habeas corpus case, any issue or question of guilt or innocence, but to show that no such issue and no such question is possible and that the accusation itself is false and fraudulent, that it is without reasonable or probable cause and is in fraud and perversion of the Constitution and laws of the United States relative to inter-state rendition and that the accused is not a fugitive from justice."

When the objection of appellee to this offer of proof was sustained and the evidence rejected by the court, the appellants then and there duly excepted, as shown by the record, page 51.

1. It is perfectly clear that unless the accused is permitted to attack the validity of the rendition proceedings upon the grounds of fraud and illegality, *and by proving want of probable cause for the accusation,* he has no remedy, but must submit to being taken from his home to a far distant state and there placed on trial upon a charge which, according to the necessary implication of the objection made by the appellee to the proffered proof, is admitted to be false and fraudulent and without reasonable or probable cause to justify it. Such is undoubtedly the interpretation the law gives the appellee's objection to the offer of proof.

Scotland Co. v. Hill, 112 U. S. 183, 186.

Unless the appellant Millard is permitted to show in this *habeas corpus* case as against the validity of the rendition proceedings, that the accusation is fraudulent and without probable cause, he is clearly without

remedy for the atrocious fraud perpetrated on the law and against him, as it cannot be shown on the trial of the charge, for then the rendition proceedings have terminated and become *functus officio,* and the illegality of the method in which he is brought into the jurisdiction of Illinois is immaterial and no defense to him, and no valid basis for objection by him, as held in *Ker v. Illinois,* 119 U. S. 436, *Cook v. Hart,* 146 U. S. 183, and *Pettibone v. Nichols,* 203 U. S. 192.

XV.

DETERMINATIVE FACTS THAT ARE ADMITTED BY THE APPELLEE ON THE FACE OF THE RECORD.

In the petition for habeas corpus, facts are alleged showing that the rendition proceedings are a fraudulent and illegal scheme of extortion (R. 4). As the averments of the petition in that respect are not controverted in the return, nor by evidence (R. 11, 29, 51), they are deemed admitted by the appellee, (*Kohl v. Lehlback,* 160 U. S. 293; *Ex parte O'Connor*, 52 Cal. App. Dec. 293). Surely the law will not sanction the use of the rendition process for any such illegal and fraudulent purpose. Facts are also alleged in the petition (R. 4, 5), showing that the rendition proceedings are in violation and subversion of the jurisdiction of the United States District Court, Northern District of Illinois, Eastern Division, and this is not controverted by the return nor by evidence (R. 11, 29, 51), and must therefore be deemed admitted by the appellee. It is

also alleged in the petition that the accusatory affidavit was not on file in any court at the time of the issuance of the requisition nor at the time of the issuance of the warrant of rendition, nor subsequent thereto (R. 3), and this fact is not controverted in the return, nor in the evidence (R. 11, 29, 51), and is therefore deemed admitted by the appellee. Section *50c*, par. 442, chap. 37 of the Revised Statutes of Illinois, expressly requires the accusatory affidavit or complaint to be filed in the Municipal Court of Chicago, and of course it can have no legal efficacy or effect and is not such a judicial proceeding as required by the law pertaining to interstate rendition, *until it is filed.* The only reference to a filing of the complaint is in the warrant of arrest issued by James A. Kearns as clerk (R. 37), and in a certificate by Jeanne M. Wallace which recite in a stereotyped form, that the complaint was filed, but this is clearly insufficient to prove the necessary filing, according to the law as stated in:

Glass v. Becker, 25 F. (2d) 929.

There is no endorsement of filing, on the accusatory affidavit, (R. 34, 35, 36).

Then, too, and as already pointed out in this brief, there is nothing in the record, no sufficient authentication to show that the attestation is in due form as required by the law of Illinois, nor that Wallace is a clerk of the court (R. 39, 40). See subdivision X of this brief. There is no certificate by Kearns.

XVI.

FRAUD VITIATES RENDITION PROCEEDINGS. PROBABLE CAUSE NECESSARY FOR RENDITION CHARGE. VOID ACCUSATORY AFFIDAVIT.

But on the point that the accused Millard has the legal right to show in this *habeas corpus* case that the rendition proceedings are fraudulent and for purpose only of extortion and private revenge, we cite the following authorities:

Matter of Strauss, 197 U. S. 324, 332, 333;
Tennessee v. Jackson, 36 Fed. 258;
Ex parte Slauson, 73 Fed. 666;
In re Cannon, 47 Mich. 481, 486, 487;
Ex parte Owens, 245 Pac. 68.

As stated by the Supreme Court respecting the matter:

> "Courts will always endeavor to see that no such attempted wrong is successful."
>
> *In re Strauss,* 197 U. S. 333.

Manifestly this can only be done by holding that the fraud makes void the rendition proceedings; but such ruling cannot be made after the proceedings terminate and become *functus officio.* It is not a question of guilt or innocence of the accused, that the court is asked to determine, but purely one of atrocious fraud on the law itself, making entirely void *ab initio* the rendition process in the case.

2. In the next place the offer of proof the District Court rejected, shows that the very charge on which

the rendition proceedings are based, *has no probable cause to justify or sustain it.* And the offer of proof specifically states that

> "our purpose is not to bring to trial in this habeas corpus case any issue or question of guilt or innocence, but to show that no such issue and no such question is possible and that the accusation itself is false and fraudulent, that it is without reasonable or probable cause" (R. 49).

Showing that the accusation is without *probable cause* does not involve a trial of the case on the issue of guilt or innocence as distinctly held by the Supreme Court in *Tinsley v. Treat,* 205 U. S. 20, 29, 32; and it is held that where there is no probable cause for the accusation, there can be no valid rendition proceedings.

Blevins v. Snyder, 22 Fed. (2d) 876, 877;
Tinsley v. Treat, 205 U. S. 20, 29, 32.

Of course it would be preposterous for the appellee or any one else to contend that even though there is *no probable cause for the charge,* there can nevertheless be valid rendition proceedings upon it.

3. In the third place, the statutory law of Illinois expressly requires that the accusatory affidavit or complaint on a criminal charge, shall contain a statement "that the complainant has just and reasonable grounds to believe that such person (the accused) committed the offense."

R. S. Ill., chap. 38, par. 687, sec. 2.

The accusatory affidavit or complaint in the instant case, entirely omits the required statement. Therefore,

being in violation of the statute, it is void as a charge of crime. *The failure to insert in the charge that the complainant has just and reasonable grounds to believe that the accused committed the offense, is conclusive that no such grounds or belief existed.* It is said by standard authority:

> "In reading an affidavit the court will look solely at the facts deposed to, and will not presume the existence of additional facts or circumstances in order to support the allegations contained in it. To the above, therefore, and similar cases, occurring not only in civil but also in criminal proceedings, the maxim *quod non apparet non est*—that which does not appear must be taken in law as if it were not—is emphatically applicable."
>
> *Broom's Legal Maxims* (8th Am. Ed.) 163.

In other words, the legal aspect of the point we are presenting is precisely the same as if the accusatory affidavit in the instant case had stated there is no probable cause for the charge. Surely any rendition proceedings based upon such an affidavit and such a confessedly unfounded charge of crime, would be absolutely void, and would at least establish on the face of the rendition record itself, that the accused is not a "fugitive from justice" of Illinois, as effectively as if it had been expressly stated in the charge that there exists no evidence to justify or sustain it. To sanction inter-state rendition proceedings in such a case would clearly be in fraud of the law relative to the subject and defeat the very purpose of the statute (R. S. U. S., sec. 5278), which is to surrender the

fugitive for only legitimate and not unlawful prosecution, the latter being clearly the case where it is virtually or expressly admitted by the accuser, on the face of the rendition record itself, that there is no evidence to support the charge, and no probable cause to justify it as an accusation. A criminal charge without any evidence to support it, is clearly void of authority in law, for manifestly legitimate prosecution or lawful conviction on such an unfounded charge is impossible in law and justice. No man can be a "fugitive from justice" if there is no evidence to prove him guilty of crime. In such cases absence of evidence of crime and absence of crime are one and the same thing, for all practical purposes. It would manifestly be ridiculous and worse than futile to extradite a man on a charge of crime when *ex concessi* there is no evidence to show even probable cause for the accusation. Clearly in such a case the law prohibits the extradition or rendition, on the ground that if there is no probable cause for the charge made against him the accused is not a fugitive from justice; and as the law will not do what is a vain and idle thing, *lex nil frustra facit,* it will not sanction or authorize his rendition on an unfounded criminal charge, that has no probable cause to support it. This is an altogether different matter from a trial of the case upon an issue of guilt or innocence as distinctly held in *Tinsley v. Treat,* 205 U. S. 20, 29, 32, and for that reason the authorities cited at page 20 of appellee's brief are not in point in that respect.

No case can be found in the books, holding that absence of probable cause for a criminal charge, is not sufficient to defeat rendition proceedings based upon it. The fact that the evidence offered by appellant Millard and ruled out by the District Court would not only establish a want of probable cause for the charge, but prove his innocence, is clearly no objection to its admissibility for the purpose of establishing want of probable cause for the accusation. It is held that in removal proceedings from one Federal district to another, there must exist *probable cause* for the charge.

Beavers v. Henkel, 194 U. S. 73, 83;
Tinsley v. Treat, 205 U. S. 20, 27, 29, 32.

And the same rule is held applicable to removal applications in both rendition and extradition cases.

Fernandez v. Phillips, 268 U. S. 311, 312;
Blevins v. Snyder, 22 F. (2d) 876, 877.

Then, too, the refusal to permit evidence of want of probable cause is a denial of the "due process of law", guaranteed the appellant Millard by the Fifth Amendment to the Constitution of the United States. So held in:

United States v. Comr., etc., 273 U. S. 103, 106.

It results that for the reasons we have given, the District Court erred in excluding the proffered evidence of want of probable cause for the accusation.

XVII.

CONCLUSION.

We have read the brief filed for the appellee and surely it cannot be correctly said that it furnishes a relevant reply to any one of the many conclusive points urged by appellants, and which entitle them on the case as it is presented by the record, to a *reversal* of the order and judgment of the District Court, with direction to discharge the appellant Millard from the imprisonment complained of in the petition for habeas corpus.

All of which is respectfully submitted.

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Dated at San Francisco this 7th day of July, 1928.